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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

ANN “BANO” CUMMINGS, et al.,

Plaintiffs and Respondents,

v.

GEORGE D. CUMMINGS III,

Defendant and Appellant.

H041308

(Santa Clara County

Super. Ct. No. 1-12-CV-222017)

This is the fourth appeal filed by appellant George D. Cummings III following a judgment ordering a partition sale of property he owned with his sisters under a family trust. His sisters, respondents Ann “Bano” Cummings, Mary Cummings, and Joan Chlarson, were granted their costs and attorney fees on two occasions, December 9, 2013 and February 24, 2014. It is the second award that is challenged in this appeal.

Background

The history of this litigation is summarized in this court’s opinions in two of appellant’s companion appeals, *Cummings et al. v. Cummings* (Nov. 23, 2016, H040069, H040710) [nonpub.opns.]¹ The underlying dispute focused on a 2.9-acre parcel and residence located in Los Altos Hills. The property had been owned by appellant and his sisters’ grandfather, George D. Cummings, and then by their father, George D.

¹ Together with H040069, H040710, and the instant appeal is *Cummings et al. v. Cummings* (Nov. 23, 2016, H041307) [nonpub.opn.]. This court ordered all four appeals to be considered together, but we have disposed of them by separate opinion.

Cummings II.² At his death in October 2010 the second George Cummings left a trust under which the trustee was granted the power to “make contracts of every kind” with respect to trust property, including selling or partitioning it. Ann Bano Cummings and Mary Cummings were the designated successor trustees. Appellant was at that time living on the property with his girlfriend. He opposed his sisters’ efforts to arrange a sale of the property. Finally, in April 2012, a year and a half after their father’s death, respondents filed this action for quiet title and partition by sale.

After extensive delays attributable to discovery conflicts³ and continuances, trial took place between June 26 and July 10, 2013, with appellant representing himself. After hearing the evidence and closing arguments, the trial court ruled that in this situation “only . . . partition by sale can be granted” because of the city’s requirement that a subdivision produce at least one acre per lot. It was thus “not practical” to divide the land in kind equally among the interested parties.⁴ Consequently, partition by sale was both necessary and the most equitable “because of the nature of this property and the laws surrounding it.” The court therefore appointed a referee to carry out its order and directed appellant to vacate within 30 days of the July 10 hearing.

The court filed its interlocutory judgment and order on August 13, 2013. On August 19, 2013, appellant was served with respondents’ amended motion for attorney fees and costs, which requested \$95,755.90 incurred through July of 2013. Respondents

² At the time of his death, George D. Cummings II actually held a 50 percent interest, the remaining interest having passed from his sisters to his children and to Gloria Parker Tomaselli. Gloria predeceased George D. Cummings II, thus necessitating a search for her heirs.

³ Appellant’s failure to respond to discovery requests led to an award of sanctions against him on May 3, 2013.

⁴ The written order specified that the proceeds of the sale, after certain fees and other expenses, would be divided 50 percent to the trust, 11.25 percent to appellant and each respondent (Joan Chlarson and her husband, Michael Chlarson, to hold one share), and 5 percent to the heirs of a deceased cousin, Gloria Parker Tomaselli.

asserted that such fees were authorized by Code of Civil Procedure sections 874.010, 874.020, and 874.040,⁵ and that the amount requested was reasonable. The trial court agreed. Applying its equitable discretion, the court determined that in light of the factual and procedural history presented at trial, defendant should bear all of the costs of suit and attorney fees. After disallowing certain costs of \$3,030.90, the court awarded respondents \$115,000 as reasonable attorney fees and costs incurred through August 30, 2013. Appellant then filed a timely notice of appeal, his second in this litigation, from the court's December 9, 2013 order.

Further litigation ensued. In January 2014 respondents sought additional attorney fees and costs incurred between September 1, 2013 and February 14, 2014, the date of the next hearing. This time, again citing sections 874.010, 874.020, and 874.040, they claimed \$57,085.65, attributable to (1) their responses to appellant's petitions to this court and the Supreme Court following the August 13, 2013 judgment;⁶ (2) their attending to concerns relating to the referee's efforts to secure possession of the property and his eviction of appellant and appellant's possessions from the property; (3) their attending to concerns relating to the removal of an underground storage tank, along with its impact on disclosures to potential buyers; (4) issues arising from the attempt to secure a policy of title insurance, driven by the title insurance company's questions about the ownership interest of Gloria Parker Tomaselli; and (5) issues arising during the listing and sale of the property and the close of escrow.

⁵ All further statutory references are to the Code of Civil Procedure.

⁶ Following the August 13, 2013 judgment authorizing the partition by sale, appellant submitted a petition for a writ of supersedeas and application for a stay of the judgment. This court denied the relief sought, and the Supreme Court thereafter denied appellant's petition for review. It is these filings to which respondents alluded in their motion, though they described them all as petitions for writ of mandamus.

Appellant opposed the supplemental motion for fees and costs. He renewed his argument raised in the previous litigation over attorney fees, that the costs of partition should be allocated based on each co-owner's proportionate interest. He also urged the court to reduce or apportion by percentage of interest those fees "bearing no relation to the Partition action or Defendant's conduct, but rather, which would have been incurred by the parties irrespective of whether the Defendant had opposed the sale or agreed to the sale from the outset"—namely, those issues pertaining to the underground storage tank, the difficulty in securing a title insurance policy, and the issues arising from the listing, sale, and close of escrow. Finally, appellant challenged as unreasonable the amount claimed by respondents' counsel, noting that the previous award attributable to the period between December 2011 through August 2013 was only \$115,000, whereas this \$57,000 claim represented only three months of work. Appellant specifically disputed the appropriateness of fees charged by respondents' attorney for assisting the referee during the sale process, because he was "not properly appointed as counsel to the Referee."

The trial court agreed with appellant that certain fees for the work respondents' counsel had performed had to be split among the parties where they related to title insurance, the underground tank, investigation of the Tomaselli heirs, and "miscellaneous" tasks that "had to be done anyway" and did not "relate specifically" to appellant's obstructive conduct. Accordingly, after the hearing the parties settled on "carve-outs" for these items, resulting in a total award of \$51,323.56 for the claimed period. The court's written order was filed on February 24, 2014, followed by this timely appeal.

Discussion

Appellant contends that he was unfairly penalized for opposing the partition by sale and by defending against it "passionately and in good faith." He does not specifically target the items adjudicated in the February 24, 2014 order, but only generally argues that all attorney fees should have been apportioned based on the parties'

proportionate interests in the property. For his further argument that the award lacks evidentiary support he directs us to the evidence and reasoning supporting the court's prior award on December 9, 2013, which we have considered in H040710. As we concluded in that appeal, we agree with the court in *Lin v. Jeng* (2012) 203 Cal.App.4th 1008 that "the broad language [of section 874.040] does not limit the trial court's equitable discretion" in apportioning attorney fees and costs to the parties in a partition action." (*Id.* at p. 1025, disagreeing with *Finney v. Gomez* (2003) 111 Cal.App.4th 527, 546.) Having no other legal or factual basis for finding abuse of discretion by the trial court in equitably allocating these supplemental costs to appellant, we must uphold the trial court's second award.

Disposition

The February 24, 2014 order awarding attorney fees is affirmed. Respondents are entitled to their costs on appeal.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.